

## **BILL ANALYSIS**

Senate Research Center

C.S.S.B. 1309  
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Jurisprudence  
4/5/2007  
Committee Report (Substituted)

### **AUTHOR'S / SPONSOR'S STATEMENT OF INTENT**

C.S.S.B. 1309 gives the State of Texas civil remedies to be invoked by the attorney general against wrongdoers who knowingly defraud the state. It allows the state to be made whole when its program and agencies are defrauded, and creates a deterrent to fraud, by providing treble damages and civil penalties upon an adjudication of knowingly committing a false claim against the state. It emulates the federal False Claims Act in providing incentives and anti-retaliation protections to encourage private persons to assist the state by exposing fraud the state might otherwise not learn about.

The bill permits the attorney general to initiate actions against culpable private parties and also permits a private person to file under seal a qui tam, or "whistleblower," action on behalf of the state. It gives the attorney general the time and tools to investigate a whistleblower's allegations and determine whether to prosecute the matter.

### **RULEMAKING AUTHORITY**

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends Subtitle C, Title 10, Government Code, by adding Chapter 2116, as follows:

#### **CHAPTER 2116. FALSE CLAIMS**

##### **SUBCHAPTER A. GENERAL PROVISIONS**

Sec. 2116.001. DEFINITIONS. Defines "claim," "qui tam action," "qui tam plaintiff," and "state."

Sec. 2116.002. WHEN A PERSON ACTS KNOWINGLY. Provides that, in this chapter, a person acts "knowingly" with respect to information if the person has certain knowledge or acts in a certain manner.

Sec. 2116.003. CERTAIN ACTIONS BARRED. (a) Prohibits a person from bringing a qui tam action based on allegations or transactions that are the subject of a civil suit or an administrative penalty proceeding in which the state is already a party.

(b) Prohibits a person from bringing a qui tam action against a member of the legislature, a member of the judiciary, or a senior official of the executive branch if the action is based on evidence or information known to the state when the action was brought.

(c) Authorizes a court, on motion of the attorney general, after considering all the equities, to dismiss a qui tam action if the elements of the actionable false claims alleged in the qui tam complaint have been publicly disclosed specifically in the news media or in a publicly disseminated governmental report, at the time the complaint is filed.

Sec. 2116.004. CHAPTER NOT APPLICABLE TO MEDICAID FRAUD. Provides that this chapter does not apply to an unlawful act described by Section 36.002 (Unlawful Acts), Human Resources Code, relating to Medicaid fraud.

[Reserves Sections 2116.005-2116.050 for expansion.]

#### SUBCHAPTER B. INVESTIGATION BY THE ATTORNEY GENERAL

Sec. 2116.051. RESPONSIBILITY OF THE ATTORNEY GENERAL. Requires the attorney general to diligently investigate the commission of a false claim under Section 2116.101 and authorizes the attorney general to bring a civil action against the person committing the false claim.

Sec. 2116.052. INVESTIGATION. (a) Authorizes the attorney general to take action under Subsection (b) if the attorney general has reason to believe that certain circumstances exist.

(b) Authorizes the attorney general to take certain actions in investigating a false claim.

(c) Prohibits the office of the attorney general from releasing or disclosing information that is obtained under Subsection (b)(1) or (2) or any documentary material or other record derived from the information except under certain conditions and to certain persons.

(d) Authorizes the attorney general to use documentary material derived from information obtained under Subsection (b)(1) or (2), or copies of that material, as the attorney general determines necessary in the enforcement of this chapter, including presentation before a court.

(e) Authorizes the attorney general, if a person fails to file a statement as required by Subsection (b)(1) or fails to submit to an examination as required by Subsection (b)(2), to file in a district court of Travis County a petition for an order to compel the person to file the statement or submit to the examination within a period stated by court order. Provides that failure to comply with an order entered under this subsection is punishable as contempt.

(f) Provides that an order issued by a district court under this section is subject to appeal to the supreme court.

Sec. 2116.053. CIVIL INVESTIGATIVE DEMAND. (a) Requires an investigative demand to include certain information.

(b) Authorizes a civil investigative demand to require disclosure of any documentary material that is discoverable under the Texas Rules of Civil Procedure.

(c) Authorizes service of an investigative demand to be made in a certain manner.

(d) Requires documentary material demanded under this section to be produced for inspection and copying during normal business hours at the office of the attorney general or as agreed by the person served and the attorney general.

(e) Prohibits the office of the attorney general from producing for inspection or copying or otherwise disclosing the contents of documentary material obtained under this section except under certain conditions and to certain persons.

(f) Requires the attorney general to prescribe reasonable terms and conditions allowing the documentary material to be available for inspection and copying by the person who produced the material or by an authorized representative of that person. Authorizes the attorney general to use the documentary material or copies

of it as the attorney general determines necessary in the enforcement of this chapter, including presentation before a court.

(g) Authorizes a person to file a petition, stating good cause, to extend the return date for the demand or to modify or set aside the demand. Requires a petition under this section to be filed in a district court of Travis County and to be filed before the earlier of certain dates.

(h) Requires, except as provided by court order, a person on whom a demand has been served under this section to comply with the terms of an investigative demand.

(i) Provides that a person who has committed a false claim has submitted to the jurisdiction of this state, and personal service of an investigative demand under this section is authorized to be made on the person outside of this state.

(j) Provides that this section does not limit the authority of the attorney general to conduct investigations or to access a person's documentary materials or other information under another state or federal law, the Texas Rules of Civil Procedure, or the Federal Rules of Civil Procedure.

(k) Authorizes the attorney general, if a person fails to comply with an investigative demand, or if copying and reproduction of the documentary material demanded cannot be satisfactorily accomplished and the person refuses to surrender the documentary material, to file in a district court of Travis County a petition for an order to enforce the investigative demand.

(l) Authorizes the court to determine the matter presented and to enter an order to implement this section if a petition is filed under Subsection (k).

(m) Provides that failure to comply with a final order entered under Subsection (k) is punishable by contempt.

(n) Provides that a final order issued by a district court under Subsection (k) is subject to appeal to the supreme court.

Sec. 2116.054. INJUNCTIVE RELIEF. (a) Authorizes the attorney general, if the attorney general has reason to believe that a person is committing, has committed, or is about to commit a false claim, to institute an action for an appropriate order to restrain the person from committing or continuing the false claim.

(b) Requires an action under this section to be brought in a district court of Travis County, or in a county in which any part of the false claim occurred, is occurring, or is about to occur.

Sec. 2116.055. ATTORNEY GENERAL AS RELATOR IN FEDERAL ACTION. Authorizes the attorney general, to the extent permitted by 31 U.S.C. Sections 3729-3733, to bring an action as relator under 31 U.S.C. Section 3730 with respect to an act for which a person may be held liable under 31 U.S.C. Section 3729. Authorizes the attorney general to contract with a private attorney to represent the state under this section.

Sec. 2116.056. STANDARD OF PROOF. Provides that the standard of proof for all elements of a cause of action under this chapter is preponderance of the evidence.

Sec. 2116.057. CHAPTER 41, CIVIL PRACTICE AND REMEDIES CODE, INAPPLICABLE TO ACTION UNDER THIS CHAPTER. Provides that Chapter 41 (Damages), Civil Practice and Remedies Code, is not applicable to a cause of action under this chapter.

[Reserves Sections 2116.058-2116.100 for expansion.]

## SUBCHAPTER C. FALSE CLAIMS

Sec. 2116.101. FALSE CLAIMS. (a) Sets forth the conditions under which a person commits a false claim.

(b) Provides that proof of the person's specific intent to commit a false claim under Subsection (a) is not required in a civil or administrative proceeding to show that a person acted "knowingly" with respect to information under this chapter.

Sec. 2116.102. CIVIL REMEDIES. (a) Provides that a person who commits a false claim under Section 2116.101 is liable to this state for certain penalties, damages, fees, expenses, and costs.

(b) Authorizes a court to assess not less than two times the amount of damages under Subsection (a)(2) if the court makes certain findings.

Sec. 2116.103. EXCLUSION. Provides that this subchapter does not apply to a claim, record, or statement made under the Tax Code.

[Reserves Sections 2116.104-2116.150 for expansion.]

## SUBCHAPTER D. ACTIONS BY PRIVATE PERSONS

Sec. 2116.151. ACTIONS BY PRIVATE PERSON AUTHORIZED; ALTERNATIVE REMEDY SOUGHT BY STATE. (a) Authorizes a private person, subject to Section 2116.201, to bring a civil action against a person committing a false claim under Section 2116.101.

(b) Provides that the action is a qui tam action on behalf of both the person and the state.

(c) Requires the qui tam action to be brought in the name of this state.

(d) Prohibits a person other than the attorney general from intervening or bringing a related action based on the facts underlying a pending action under this subchapter.

Sec. 2116.152. INITIATION OF ACTION. (a) Requires a qui tam plaintiff to serve a copy of the petition and a written disclosure of substantially all material evidence and information the person possesses on the attorney general in compliance with the Texas Rules of Civil Procedure.

(b) Requires the petition to be filed in camera and, except as provided by Subsection (d) or (e), to remain under seal until at least the 180th day after the date the petition is filed or the date on which the state elects to intervene, whichever is earlier. Prohibits the petition from being served on the defendant until the court orders service on the defendant.

(c) Authorizes the state to elect to intervene and proceed with the action not later than the 180th day after the date the attorney general receives the petition and the material evidence and information.

(d) Authorizes the attorney general, at the time the state intervenes, to file a motion with the court requesting that the petition remain under seal for an extended period.

(e) Authorizes the state, for good cause shown, to move the court to extend the 180-day deadline under Subsection (b) or (c). Authorizes a motion under this subsection to be supported by affidavits or other submissions in camera.

(f) Authorizes an action under this subchapter to be dismissed before the end of the period during which the petition remains under seal only if the court and the attorney general consent in writing to the dismissal and state their reasons for consenting.

Sec. 2116.153. ANSWER BY DEFENDANT. Provides that a defendant is not required to file in accordance with the Texas Rules of Civil Procedure an answer to a petition filed under this subchapter until the petition is unsealed and served on the defendant.

Sec. 2116.154. CHOICE OF STATE. (a) Requires the state to take certain actions not later than the last day of the period described by Section 2116.152(c) or an extension of that period as provided by Section 2116.152(e).

(b) Requires the court to dismiss the action if the state declines to take over the action.

Sec. 2116.155. ACTION CONDUCTED BY STATE. (a) Provides that this section applies to a qui tam action the state takes over under Section 2116.154(a)(1).

(b) Provides that the state has the primary responsibility for prosecuting the action and is not bound by an act of the qui tam plaintiff.

(c) Entitles the qui tam plaintiff to continue as a party to the action subject to this section.

(d) Authorizes the state, notwithstanding the objection of the qui tam plaintiff, to dismiss the action for good cause if certain conditions are satisfied.

(e) Authorizes the state, notwithstanding the objection of the qui tam plaintiff, to settle the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances.

(f) Authorizes the court, on a showing by the state that unrestricted participation in the litigation of the action by the qui tam plaintiff would interfere with or unduly delay the state's prosecution of the case or would be repetitious, irrelevant, or for purposes of harassment, to impose certain limitations on the person's participation.

(g) Authorizes the court, on a showing by the defendant that unrestricted participation in the litigation of the action by the qui tam plaintiff would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, to limit the participation by the qui tam plaintiff in the litigation.

Sec. 2116.156. STAY OF CERTAIN DISCOVERY. (a) Authorizes the court to stay the discovery for a period not to exceed 60 days on a showing by the state that certain actions of discovery by the qui tam plaintiff would interfere with the state's investigation or prosecution of a criminal or civil matter arising out of the same facts.

(b) Requires the court to hear a motion to stay discovery under this section in camera.

(c) Authorizes the court to extend the period prescribed by Subsection (a) on a further showing in camera that the state has pursued the criminal or civil investigation or proceedings with reasonable diligence and that any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

Sec. 2116.157. AWARD TO QUI TAM PLAINTIFF WHEN STATE PROCEEDS WITH ACTION. (a) Provides that, if the state proceeds with an action under this

subchapter, the person bringing the action is entitled, except as provided by Subsection (b), to receive at least 15 percent, but not more than 25 percent, of the proceeds of the action, depending on the extent to which the person substantially contributed to the prosecution of the action.

(b) Authorizes the court, if the court finds that the action is based primarily on disclosures of specific information, other than information provided by the person bringing the action, relating to allegations or transactions in a civil or criminal hearing, in a legislative or administrative report, hearing, audit, or investigation, or from the news media, to award the amount the court considers appropriate but not more than seven percent of the proceeds of the action. Requires the court to consider the significance of the information and the role of the person bringing the action in advancing the case to litigation.

(c) Requires a payment to a person under this section to be made from the proceeds of the action. Entitles a person receiving a payment under this section to receive from the defendant an amount for reasonable expenses, reasonable attorney's fees, and costs that the court finds to have been necessarily incurred. Requires the court's determination of expenses, fees, and costs to be awarded under this subsection to be made only after the defendant has been found liable in the action.

(d) Provides that, in this section, "proceeds of the action" includes proceeds of a settlement of the action.

Sec. 2116.158. REDUCTION OF AWARD. (a) Authorizes the court, if the court finds that the qui tam plaintiff planned and initiated the false claim that is the basis of the qui tam action, to the extent the court considers appropriate, reduce the share of the proceeds of the action the person would otherwise receive under Section 2116.157, taking into account the qui tam plaintiff's role in advancing the case to litigation and any relevant circumstances pertaining to the violation.

(b) Requires the court, if the qui tam plaintiff is convicted of criminal conduct arising from the person's role in the false claim, to dismiss the plaintiff from the civil action and prohibits the plaintiff from receiving any share of the proceeds of the action. Provides that a dismissal under this subsection does not prejudice the right of the state to continue the qui tam action.

Sec. 2116.159. STATE NOT LIABLE FOR CERTAIN EXPENSES. Provides that the state is not liable for expenses that a qui tam plaintiff incurs in bringing an action under this subchapter.

Sec. 2116.160. RETALIATION BY EMPLOYER AGAINST PERSON BRINGING SUIT PROHIBITED. (a) Provides that a person who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms of employment by the person's employer because of a lawful act taken by the person in furtherance of a qui tam action, including investigation for, initiation of, testimony for, or assistance in a qui tam action filed or to be filed, is entitled to all relief necessary to make the person whole, including certain financial and status-related relief.

(b) Authorizes a person to bring an action in the appropriate district court for the relief provided in this section.

[Reserves Sections 2116.161-2116.200 for expansion.]

#### SUBCHAPTER E. ACTION BY STATE

Sec. 2116.201. STATE MAY PURSUE ALTERNATE REMEDY. (a) Authorizes the state, after a qui tam action is filed, to elect to prosecute the false claim that is the subject of the action through any alternate remedy available to the state, including any administrative proceeding to determine an administrative penalty.

(b) Provides that the qui tam plaintiff has the same rights in the other proceeding as the person would have had if the action had continued in the original forum, including a monetary award as provided by Subchapter D.

(c) Provides that a finding of fact or conclusion of law made in the other proceeding that has become final is conclusive on all parties to the qui tam action. Provides that, for purposes of this subsection, a finding or conclusion is final if certain conditions are satisfied.

SECTION 2. Amends Section 41.002(d), Civil Practice and Remedies Code, to provide that, notwithstanding any provision to the contrary, this chapter (Damages) does not apply to an action brought under Chapter 2116, Government Code.

SECTION 3. Makes application of this Act prospective.

SECTION 4. Effective date: upon passage or September 1, 2007.